Supreme Court, U.S.
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IN THE

United States Supreme Court

OCTOBER 1998 TERM

PATRICK L. TESSIER,
Petitioner

V.

IN RE: COMBUSTION, INC.
PLAINTIFFS' STEERING COMMITTEE,
Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED FOR REVIEW

Whether notification procedures in a Federal Rule 23(b)(3) class action litigation are Constitutionally infirm under the Fourteenth Amendment to the United States Constitution where an identifiable class member who has general knowledge of the existence of a class action litigation is not given individual notice containing the information required by Rule 23(b)(2) of the Federal Rules of Civil Procedure.

STATEMENT OF INTERESTED PARTIES

The parties to this proceeding are the Appellant, Patrick L. Tessier, and the In re: Combustion, Inc. Plaintiff's' Steering Committee, c/o Mr. Calvin C. Fayard, Fayard & Honeycutt, 519 Florida Ave., Denham Springs, Louisiana 70726.

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IN THE UNITED STATES SUPREME COURT
OCTOBER 1998 TERM

No. _____

PATRICK L. TESSIER,
Petitioner

V.

IN RE: COMBUSTION, INC.
PLAINTIFFS' STEERING COMMITTEE,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Patrick L. Tessier respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. In furtherance of his petition, Mr. Tessier shows the Court as follows:

OPINIONS BELOW

The initial opinion of the Fifth Circuit in this matter was unpublished, but is cited as *Combustion v. Tessier*, 103 F.3d 124 (5th Cir. 1996) and is reprinted in the Appendix (App.) at page 19a . The opinion over which writs are currently sought is also unpublished and the cite is currently unavailable. This opinion is reproduced at App. p. 2a . The United States District Court for the Western District of Louisiana issued two separate opinions, neither of which is believed to be officially reported. The district court opinion directly at issue in this writ application is reproduced at App, p.5a. The opinion from which the first appeal was taken is reproduced at App., p. 28a .

STATEMENT OF JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was issued on September 18, 1998. A timely petition for rehearing was denied by the Court of Appeals on November 20, 1998 (App. p. 17a. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED IN THIS CASE

Federal Rules of Civil Procedure Rule 23(c)(2):

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

United States Constitution, Amendment Fourteen, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Statement of the Facts.

Mr. Patrick Tessier owns a tract of land within one-quarter mile of a toxic waste site in Livingston Parish, Louisiana which is the source of the litigation in the In re: Combustion, Inc. class action lawsuit. He has owned this land for more than fifteen years, though he moved to East Baton Rouge Parish before this litigation began and is an absentee class member. Among the claims being made against the various defendants in the class action are claims for diminution in the value of immovable property. The defined class includes, among others, all persons or entities that own property in Livingston Parish, Louisiana. It is undisputed that Mr. Tessier is a class member.

Despite the close proximity of Mr. Tessier's land to the waste site in issue, the Plaintiff's Steering Committee, hereafter, "PSC", never gave him actual notice by mail or any other means of the pendency of the class action. In fact, the PSC did not send any notice to any class member who did not first contact the PSC in some way.

Accepting the district court's apparent finding Mr. Tessier knew of the existence of the class action prior to the deadline for filing a proof of claim, the record is devoid of any evidence that he knew any of the information required by Rule 23(c)(2) notice. Mr. Tessier has consistently asserted that he had no such knowledge.

2. Course of Proceedings and Disposition in Court Below.

On or about September 11, 1995, Mr. Patrick Tessier filed a request for permission to file a late proof of claim in a Federal Rule 23(b)(3) class action entitled, In re: Combustion, Inc.. At the conclusion of a fairness hearing on September 27, 1995, District Judge Richard T. Haik ruled that the Mr. Tessier had been given sufficient notice of the requirement to complete a Proof of Claim in a timely manner. He also found that Mr. Tessier did not comply with the requirement and did not show good cause for such failure. (App., p. 28a.) On October 24, 1995, Mr. Tessier filed his notice of appeal in this matter with the United States District Court for the Western District of Louisiana.

On November 13, 1996, the Fifth Circuit Court of Appeals

issued a written, unpublished opinion, No. 96-30210, Summary Calendar, addressing Mr. Tessier's appeal along with other appeals. The Fifth Circuit ordered a remand to consider Mr. Tessier's request to join the class of plaintiffs in light of the notice requirements outlined in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct.2140, 40 L.Ed. 732 (1974). (App., p. 27a.)

Pursuant to this remand, the matter came on for hearing again on April 1, 1997 before district Judge Richard T. Haik. After oral and documentary evidence was introduced, the district court took the matter under advisement. On June 13, 1997, Judge Haik issued a Ruling and Order again denying Mr. Tessier's request to complete a late proof of claim. The *Eisen* issues were not addressed in this Ruling. The only reason stated for denying Mr. Tessier's application to file a late proof of claim was that the district judge had difficulty giving credibility to Mr. Tessier's claim he did not know of the litigation. (App., p. 5a,9a, 15a)

On July 7, 1997, Mr. Patrick Tessier again filed a notice of appeal in this matter with the United States District Court for the Western District of Louisiana. On September 18, 1998, the Fifth Circuit Court of Appeals issued a ruling affirming the decision of the District Court as follows: "On remand, the district court found that Tessier had actual notice of the litigation and, therefore, determined that individual notice was not required. (paragraph) Our review of the record, briefs, and applicable law discloses neither error nor abuse of discretion in the district court's credibility call on this issue." (App., p. 4a.)

Mr. Tessier filed a timely request for rehearing asserting that if knowledge of the existence of a lawsuit is equivalent to notice, there was no evidence in the record from which a court could possibly conclude the notice was legally and Constitutionally adequate. The Fifth Circuit denied the petition for rehearing without comment on November 20, 1998. (App., p. 17a.)

Mr. Tessier now files this Petition for Certiorari with the United States Supreme Court.

3. Basis for Federal jurisdiction in Court of Appeal

The original appeal before the Fifth Circuit was from a final Rule 54(b) judgment that certified Mr. Tessier's prior dismissal. The

second appeal, which is now at issue, arises from the direct remand order of the Fifth Circuit. A Court retains jurisdiction over its previous mandates. *National Surety Corp. v. Charles Carter & Co., Inc.* 621 F.2d 739, at 741 (5th Cir. (La.) 1980).

REASONS FOR GRANTING THE WRIT

Introduction

Mr. Patrick Tessier requests the United States Supreme Court grant his petition for writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit that sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory jurisdiction. By the plain language of Rule 23(c)(2) of the Federal Rules of Civil Procedure and this Court's opinions in *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 94 S.Ct.2140, 40 L.Ed. 732 (1974) and *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), identifiable class members are entitled to individual notice apprising them of the pendency of the class action and informing them of rights and deadlines. In *Eisen v. Carlisle and Jacquelin*, 417 U.S. at 175, 94 S.Ct. 2140, 40 L.Ed. 732 (1974), this Court has stated, "... the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort."

At the hearing on remand in this matter, Mr. Tessier presented abundant evidence in the district court that he was identifiable through reasonable effort, therefore entitled to individual notice. The district court, however, denied Mr. Tessier's application to file a late proof of claim because it apparently found Mr. Tessier knew of the existence of the litigation. On three occasions in its June 13, 1997 Ruling, the District Court stated difficulty giving "credibility" or "credence" to Mr. Tessier's claim that he did not know about the "litigation" or "law suit"[1]. (App., p. 5a, 9a, 15a.)

The Fifth Circuit affirmed and upheld the district court's determination despite Mr. Tessier's arguments that if he did know the class action lawsuit was pending, he did not know any of the information Constitutional and legal notice would have afforded him. No such evidence was presented and no such evidence was cited by the District Court or the Fifth Circuit Court of Appeals.

Mr. Tessier suggests to this Honorable Court there is no precedent in law or in the jurisprudence of any Federal appellate court, including the Fifth Circuit, that allows general knowledge of a class action litigation to be equated with receipt of Constitutionally and legally sufficient notice. To the contrary, in *Mullane*, 339 U.S., at p. 314, this Court observed that sufficient notice must convey specific information:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mr. Tessier further suggests that the holding of the Fifth Circuit imposes a Constitutionally invalid duty on him to investigate and protect his rights before he has knowledge he is a class member. See *Martin v. Wilkes*, 490 U.S. 755 at 765, 109 S.Ct. 2180 at 2186, 104 L.Ed.2d 835 (U.S. Ala. 1989) and *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 at 552, 94 S.Ct. 756 at 765, 38 L.Ed.2d 713 (U.S. Cal. 1974), discussed below.

In the In re: Combustion Inc. class action litigation, no class member received notice unless he or she in some way contacted the Plaintiffs Steering Committee first. The Fifth Circuit has sanctioned a procedure that omits the elementary and fundamental requirement of adequate notice to identifiable class members by equating general knowledge of the pendency of a class action with adequate notice. Mr. Tessier suggests this departure from accepted and settled law carries important ramifications and calls for an exercise of this Court's supervisory power.

Argument and Authorities

I. If knowledge of a lawsuit equates to legal notice, then Mr. Tessier's notice was legally and Constitutionally insufficient.

If knowledge of a lawsuit equates to notice, then the notice given Mr. Tessier was legally and Constitutionally insufficient. Rule

23 (c)(2) in pertinent part says as follows:

> . . . The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

As recited, the Rule 23 requirements for legal notice include advising each class member of the following:

a) He or she will be excluded from class membership if requested by a specific date;
b) Any judgment will be binding against the class member;
c) If a class member does not request exclusion, he or she may enter an appearance through counsel;
d) Implicit in this is that the class member will be notified he or she qualifies as a class member.

The Advisory Committee to Rule 23 "explicated its incorporation of due process standards by citation to *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and like cases." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 174, 94 S.Ct.2140, 2150-2151, 40 L.Ed. 732 (1974).

In *Mullane* the Supreme Court set forth some of the Constitutional requirements for sufficiency of notice under the Fourteenth Amendment. The *Mullane* Court, 339 U.S. at p. 314, stated as follows:

> Against this interest of the state we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that '**The fundamental** (emphasis added) requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

...

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted.) The notice must be of such nature as reasonably to convey the required information, (citation omitted), and it must afford a reasonable time for those interested to make their appearance. (Citations omitted.)

Neither Rule 23 nor the Constitution requires individual notice in every instance, but individual notice is required for all class members who can be identified through reasonable efforts. *Eisen v. Carlisle and Jacquelin*, 417 U.S., at 174 *et seq.*. Rule 23, F.R.C.P..

Nonetheless, in accordance with the *Mullane* standard, Constitutionally sufficient notice must include the following:

a) An opportunity to be heard;
b) Information that a matter is pending so a member can choose to appear or default, acquiesce or contest;
c) Notice reasonably calculated to apprise the class member of the pendency of an action;
d) An opportunity for a class member to present his or her objections;
e) The required information must be conveyed;
f) It must afford the class member reasonable time to make his or her appearance;
g) Implicit in these requirements is that the class member be provided sufficient information to determine whether or not he qualifies as a class member.

At best, the District Court concluded Mr. Tessier knew an action was pending. See the District Court's statements at endnote 1. Beyond this finding, there is no evidence in the record showing Mr. Tessier had any knowledge of facts sufficient to comprise legal notice, and the district court or the Court of Appeals for the Fifth Circuit cited none. Accordingly, there is no finding he had knowledge

he might have any interest in the class litigation[2]. There is no finding he knew he had a right to opt out of the class. There is no finding he knew he would be subject to any judgment obtained in the class action. There is no finding he knew he could enter an appearance. There is no finding Mr. Tessier knew he had any rights or any involvement in any way with the In re: Combustion, Inc. class action lawsuit.

If knowledge of the existence of the In re: Combustion, Inc. litigation was Mr. Tessier's notice, the notice was legally insufficient under Rule 23 and the Constitutional precepts set forth in *Mullane*.

II. Knowledge of a lawsuit imposes no duty to intervene.

As the Supreme Court stated concerning the effect of knowledge of a pending lawsuit in *Martin v. Wilkes*, 490 U.S. 755 at 765, 109 S.Ct. 2180 at 2186, 104 L.Ed.2d 835 (U.S. Ala. 1989), "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene (emphasis added), is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."

Specifically regarding class actions, this Court said:

> Not until the existence and limits of the class have been established and notice of membership has been sent (emphasis added) does a class member have any duty to take note of a suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 at 552, 94 S.Ct. 756 at 765, 38 L.Ed.2d 713 (U.S. Cal. 1974).

This Court spoke very plainly in *Eisen v. Carlisle and Jacquelin*, 417 U.S., at 173, 94 S.Ct., at 2150 concerning the Rule 23 requirement that individual notice be sent to all class members whose names and addresses may be identified through reasonable effort:

> We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

Perhaps Mr. Tessier could be estopped from asserting his claim herein if the district court could have properly found he possessed the knowledge that legal, Constitutional notice would have afforded him. But, there is no such finding because there is not a scintilla of evidence proving Mr. Tessier knew anything about the In re: Combustion, Inc. class action other than, possibly, that it was pending. The law imposes no duty on Mr. Tessier to mount a formal investigation to secure his rights. The law and the Constitution require legally sufficient notice.

At best, the district court found that Mr. Tessier "knew" or "had knowledge" of the "litigation" or "law suit". Knowledge of the existence of a lawsuit is hardly knowledge rising even close to the threshold of legally and Constitutionally sufficient notice.

Conclusion

Awareness of the existence of a lawsuit is not legal notice. Neither factually nor legally. Mr. Tessier has complained from the beginning of his involvement in these proceedings that he had no prior notice of these proceedings. There is no finding Mr. Tessier had the knowledge that legally and Constitutionally sufficient notice would have provided. Mr. Tessier has consistently maintained that he had no such knowledge. The district court never concluded or found that Mr. Tessier had such knowledge. At best, the district court has held Mr. Tessier had knowledge that the In re: Combustion, Inc. litigation existed. This is not enough.

Mr. Tessier is asserting his right as an individual to have "the elementary and fundamental requirement of due process"[3] under the Fourteenth Amendment be met. The foundation of the Combustion Inc. litigation was built on shifting and Constitutionally infirm sand. Neither Mr. Tessier, nor thousands upon thousands of class members with sufficient connection to Livingston Parish, were given legally sufficient notice of the pendency of the class action litigation even though their names and addresses were identifiable through reasonable effort.

The Court of Appeals for the Fifth Circuit's sanctioned a

procedure that equates general knowledge of the existence of a class notice. This so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's jurisdiction. Mr. Tessier asks this Court to grant a writ of certiorari in this matter.

Respectfully submitted this 16th day of February 1999.

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[1] The District Court's statements in its June 13, 1997 Ruling were as follows:

P. 5a – "Specifically the Court finds it very difficult to give credibility to Mr. Tessier's contention that he did no know about this litigation prior to the summer of 1995."

P. 9a - "..., the Court has difficulty giving credence to Mr. Tessier's contention that he did not know of the litigation."

P. 15a – "While he (Mr. Tessier) may not have received any written notification, this Court has great difficulty giving credence to his testimony that he had no knowledge of the law suit."

[2] The record reflects that the Combustion, Inc. Class action was overwhelmingly one for personal injuries. Mr. Tessier makes no claim for personal injury, but for damage to his property.

[3] *Mullane*, 339 U.S., at p. 314.

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. Court of Appeals
Filed
Sep 18, 1998
Charles R. Fulbruge III
Clerk

No. 97-30822
Summary Calendar

In re: COMBUSTION, INC.

PLAINTIFFS' STEERING COMMITTEE,

Plantiff-Appellee

versus

PATRICK L. TESSIER,

Movant-Appellant

Appeal from the United States District Court
For the Western District of Louisiana
(94-MDL-4000)

Before POLITZ, Chief Judge, EMILIO M. GARZA and DeMOSS, Circuit Judges.

POLITZ, chief judge:*

This appeal arises out of a mass disaster toxic tort class action involving a hazardous waste dump site located in Livingston Parish, Louisiana. The site served as an oil recycling

center until 1980 and is now known as the Combustion, Inc. Superfund Site.

By December of 1994 over 13,000 claimants had filed proof of claim forms in this action. In July of 1995 the district court approved a preliminary settlement agreement between the class and some of the defendants and ordered a fairness hearing thereon. The court also ordered all class members who had failed to file a timely proof of claim to notify the court of their intention to appear at the hearing and to show good cause why they should be allowed to take part in the litigation.

Patrick L. Tessier notified the court that, as a land owner in the contaminated area, he qualified as a class member and that he had not received notice of the suit until after the deadline for filing proof of claim. At the hearing, Tessier informed the court that his name and address was reasonably ascertainable to the Plaintiffs' Steering Committee and that due process required that he receive personal notice. The district court,

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* Pursuant to 5th CIR. R. 47.5, the Court has determined that this option should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

finding that notice was reasonable and adequate, initially refused to allow Tessier to take part in the litigation.

On appeal, we noted that **Eisen v. Carlisle & Jacquelin**[1] requires that individual notice be given to all class members whose names and addresses are ascertainable through reasonable effort. As it was not clear from the district court's order whether the Eisen standard had been applied, we remanded for this determination.[2] On remand, the district court found that Tessier had actual notice of the litigation and, therefore, determined that individual notice was not required.

Our review of the record, briefs, and applicable law discloses neither error nor abuse of discretion in the court's credibility call on this issue.

The judgement appealed is AFFIRMED.

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[1] 417 U.S. 156 (1974)

[2] Combustion v. Tessier, 103 F.3d 124 (5th Cir. 1996) (unpublished table decision)

U.S. District Court
Western Division of Louisiana
Filed
June 13, 1997
Robert H. Shemwell, Clerk
By: ROW
Deputy

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUAS DIVISION

IN RE: COMBUSTION, INC.

*CIVIL ACTION NO. 94MDL4000

* ALL CASES

* JUDGE RICHARD T. HAIK

****

RULING

****

Before the Court, on remand, is the request by Mr. Patrick Tessier to file a late proof of claim. The court believes that the notices disseminated by the Plaintiffs' Steering Committee were reasonably calculated to reach every member of the class in the most practicable method under the circumstances. Specifically the Court finds it very difficult to give credibility to Mr. Tessier's contention that he did not know about this litigation prior to the summer of 1995. For the reasons discussed below, the Court denies the request.

I

A brief background of the facts regarding the site are that in the 1960, Earl Dubose began operating an oil reclamation business in his back yard in Livingston Parish. He had waste oil dumped into the ground pits and sold the oil that separated from the other waste products as recycled fuel oil. Dubose developed the business until 1977 when he sold it to Arthur Gammons. Gammons incorporated the site as Combustion, Inc. and continued operating essentially the same business. The site closed in 1982 because of regulatory and financial problems and was subsequently listed as a Superfund site by the United States Environmental Protection Agency.

The first suit was filed in 1986 in state court in Livingston Parish. The case was removed permanently in 1994 to federal court. Final certification of the Class came in 1993. Geographically, the Class was essentially the entire Parish of Livingston:

> All persons or entities who or which own real or personal property and/or live and/or operate places of business and/or work and/or attend school in Livingston Parish, Louisiana, and/or who have been so situated during the time since the early 1960's, and who or which claim to have sustained damages as a result of the discharge, release or leakage of

> toxic substances from the premises now or formerly known as Dubois Lane and Milton Road and Burgess Road in Livingston Parish, Louisiana.

It is not disputed that Mr. Tessier currently owns property in Livingston Parish, and at the time the Class was certified, he was a member of the Class.

In early April 1993, pursuant to order of the Court, the Plaintiffs' Steering Committee (PSC) mailed the *Important Notice of Certification* to all known Class members and published the notice on March 27 and April 10, 1993, in the Denham Springs News and the Morning Advocate. The certification notice advised Class members of their option to opt-out of the law suit. *See Tessier #2.* These newspapers enjoy extensive, parish-wide circulation. The notice was also posted in the Clerk of Court's office in Livingston Parish.

Pursuant to Fed. R. Civ. Pro. 23(d), the Court then ordered all Class members to file Proof of Claim forms by December 31, 1994. Notice was disseminated in July 1994 in the same manner. *See Tessier #3.* The deadline was later extended until April 11, 1995. A second *Important Notice to Class,* reminding Class members to file a proof of claim forms, was similarly disseminated in early December 1994. *See Tessier*

#4.

On August 10, 1995, after the first wave of settlements were consummated, the PSC instigated another mass mailing notice. *See Tessier #5, #6a, #6b.* The Committee mailed *Important Notice to class Members Regarding Partial Settlement* to sixty-five attorneys who were known to have represented or who were currently representing Class members. This notice was also mailed to all known Class members – 9934 items of mail – along with two newsletters, one to the claimants and the other to the putative Class members. In addition, the notice was published on August 10 and 24, 1995 in the Baton Rouge Advocate and the Denham Springs News, and it was posted in the Clerk of Court's office in Livingston Parish.

This notice announced the $80,000,000 partial settlement and instructed the Class members that they would be entitled to part of this sum at a later date. It also provided that any Class member who had not filed a timely proof of a claim form but had just reason to believe he may be entitled to receive an award of damages must write to the Court of his intention to appear at the fairness hearing September 25, 1995. That party was then required to appear and to explain his reason

for not filing a timely claim.

Mr. Tessier requested permission to file a late proof of claim form on September 8, 1995, almost five months after the filling deadline, contending that he had no notice of the litigation. *See Tessier #10.* At the fairness hearing, the Court denied Mr. Tessier's request from the bench without comment. Tessier appealed, and in a Summary Calendar *per curiam,* No. 95-31089, January 17, 1997, the Fifth Circuit remanded the proceeding to determine "whether reasonable effort would have included a search of any public records that contained Mr. Tessier's name and address." *Op. At p.7.*

II

On remand, this Court conducted on evidently hearing, After listing to three hours of testimony including testimony from Mr. Tessier, *see Transcript, Hearing April 1, 1997 p. 138-169*, the court has difficulty giving credence to Mr. Tessier's contention that he did not know of the litigation.

Credibility assessments are made by the trial court and once made are accorded great deference. *Dardar v. LaFourche Realty CO.*, 55 F.3rd 1082(5th Cir.1995). As is the case with most class actions, the case at bar has its own peculiar

characteristics. In this case, the length of the alleged harm, the Class definition, and the timing of this particular litigation highlighted the enormity, and difficulty, of this case from its inception. It was the talk of the community in 1986, and today the word Combustion invokes conversation familiar to many sectors of the Baton Rouge and Livingston Parish communities.

The alleged injuries and property damages occurred over a period of 30 years. As a result, the Class definition of the entire parish included any resident of the parish at any time beginning in the early 1960s and extending to 1994. The transient nature of the Livingston Parish residents complicated any effort to finitely identify the class members. In many instance, relatives remaining in the parish were the best source of location potential claimants who had moved away. From the outset, one strategy followed by the PSC was the use of personal communications, word of mouth, to locate Class members.

Prior to Class certification, potential plaintiffs were notified of the law suit through public meetings held at schools and other places near the site. Plaintiffs' attorneys were interviewed on Baton Rouge television and "dozens of times"

by the Baton Rouge and Denham Springs newspapers. *Transcript April 1, 1997 hearing, testimony of Mr. Pardue p.36-42*. In addition to the official notices, stories were featured in the Baton Rouge Morning Advocate, the Baton Rouge State Times, the Livingston Times, and the Denham Springs News. All papers enjoyed parish-wide circulation. Id. *See also Plaintiffs' Exhibit 16*(collection of newspaper articles in all area papers about the site).

One of the regular news features in the Baton Rouge Advocate business section is entitled "Florida Parishes" and covers newsworthy event in Livingston Parish. The list below is a sample

Of the coverage afforded the *Combustion* site and law suit in the Baton Rouge newspaper:

1986 – six in August through year end
1988 – three in June and one in July
1990 – four throughout the month of December
1991 – one in March, six in April, two in May
1992 – two in February, three in March, two in April, one each in May and June, two each in July and October, one in November
1993 – three in March, one each in June and October
1995 – one in July

The PSC opened claims offices in 1990 on major thoroughfares in the city of Denham Springs, the site

community. A large sign, "Combustion Claims Office," was erected beside one office located in a large shopping center. There were three claims offices, and at times two were opened simultaneously, often six days per week. Potential plaintiffs were encouraged to call and give their names and addresses to the staff at the office and also names and addresses of friends and relatives who may have claims to assert. In fact, the gentleman who helped Mr. Tessier collect rent, Mr. Arthur Eby, signed up at the claims office on July 22,1992. These names and addresses were entered on computer and formed the base for Class communications throughout the process. Twelve thousand potential claimants called or came to the offices to complete questionnaires, the precursor of the proof of claim form.

In addition, the issue of contamination by toxic chemicals was not inconsequential for Livingston Parish, nor was it novel. By 1986, the State regulatory authorities were heavily involved with monitoring the Combustion site. The Unites States Environmental Protection Agency declared it a Superfund site at a time when national media and political attention focused on such designated areas. Just prior to the

filing of the law suit, Livingston Parish was the location of a horrendous accident resulting form a train derailment, where toxins being carried in rail cars spewed on the town of Livingston. Homes were evacuated for weeks, and the water supply was poisoned. It is fair to conclude that the awareness of the dangers of chemical toxins was keenly in the minds and on the tongues of the residents of Livingston Parish. Testimony of putative class members at the September 25, 1995 fairness hearing was that "everyone was talking about It." *Transcript of fairness hearing , September 25, 1995, Mr. Peake, p.96.*

Mr. Tessier has shown that he is an alert and astute business man. It is not disputed that he is the owner of two contiguous parcels of land within 1/4 mile of the site. In fact, Mr. Tessier and his wife rented a house on that land for four or five years until 1981, prior to his purchase of the property. These years are commonly referred to as the "hottest" years of activity at the site. In 1981, after the site had blown up again, his wife insisted and they moved to Baton Rouge, about 15 miles west of the site. They have lived at that same residence since that

time.

It was in 1982 and 1983, when the site closed because of financial and regulatory complications, that Mr. Tessier purchased the very property he had rented, and more – about 100 acres totally. These two parcels of land form the basis of his claim. From that time forward, Mr. Tessier has maintained a rental business with the houses and trailers he installed in between the houses. He has approximately 20 units.

As to be expected, Mr. Tessier's testimony verified that he is and has been familiar with the activities at the site. He knew that Earl Dubose has sold the site and moved to Florida. He was well aware of the condition of the site before he had moved, of its volatility, smell, and location of the waste pits. He was also aware of that the site had been cleaned up in the 1980s because he noticed the changes when he made trips out to check on his property and collect rent from Mr. Eby. He knew that the main entrance road, the same road on which he had lived, had been resurfaced in the 1980s, that the skull and cross-bones signs had been posted at that time along the entrance road indicating the extreme danger of the site.

Mr. Tessier is an educated businessman. He has a degree

in accounting from Louisiana State University. He testified that he reads the Baton Rouge Advocate daily, including the business section. He even admits that he may have read articles about the law suit, but that it did not "ring a bell." While he may not have received any written notification, this Court has great difficulty giving credence to his testimony that he had no knowledge of the law suit.

This Court shall again deny Mr. Patrick Tessier permission to complete a late proof of claim form.

THUS DONE AND SIGNED this 13th day of June, 1997.

R. T. Haik

RICHARD T. HAIK, SR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DIVISION OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

IN RE: COMBUSTION, INC.

U.S. District Court
Western Division of Louisiana
Filed
June 13, 1997
Robert H. Shemwell, Clerk
By: ROW
Deputy

* CIVIL ACTION NO. 94MDL4000

* ALL CASES

* JUDGE RICHARD T. HAIK

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ORDER

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CONSIDERING the forgoing Ruling,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the request by Patrick Tessier to complete a late proof of claim form is DENIED.

THUS DONE AND SIGNED this 13th day of June, 1997.

R. T. Haik

RICHARD T. HAIK, SR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. Court of Appeals
Filed
Nov. 20, 1998
Charles R. Fulbruge III
Clerk

No. 97-30822

In Re: COMBUSTION, INC.

PLAINTIFFS' STEERING COMMITTEE

Plaintiff – Appellee

v.

PATRICK L. TESSIER

Movant – Appellant

Appeal from the United States District Court for the Western District of Louisiana, Lafayette

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

Henry A. Politz

Chief Judge

UNITED STATES COURT OF APPEALS

for the Fifth Circuit

U.S. Court of Appeals
Filed
Nov 13, 1998
Charles R. Fulbruge III
Clerk

No. 95-31073
Summary Calendar

IN RE: COMBUSTION

PLAINTIFFS' STEERING COMMITTEE
Plaintiffs-Appellees,

VERSUS

JOHN H. DAY, JR.; FRANKIE S. DAY; JOHN ALAN DAY;.
DAVID MARK DAY; SHARON DAY HULGAN; WENDI S. DAY; AND
MARTIE S. HUTCHINSON
Movants-Appellants

******

No. 95-31089
Summary Calendar

IN RE: COMBUSTION

PLAINTIFFS' STEERING COMMITTEE,
Plaintiffs-Appellees

VERSUS

PATRICK L. TESSIER,
Movant-Appellant.

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No. 96-30208
Summary Calendar

IN RE: COMBUSTION

PLAINTIFFS' STEERING COMMITTEE,

Plaintiff-Appellee

VERSUS

DIANE P. COGLEY JOHNSON,

Movant-Appellant.

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No. 96-30210
Summary Calendar

IN RE: COMBUSTION

PLAINTIFFS' STEERING COMMITTEE

Plaintiffs-Appellees

VERSUS

JOHN J. COGLEY, SR.; JOHN J. COGLEY, JR.,

Movants-Appellants.

Appeals from the United States District Court
for the Western District of Louisiana
(94-MD-4000)

Before DAVIS, EMILIO M. GARZA, and STEWART,
Circuit Judges.

PER CURIAM:[1]

John J. Day, Jr., Patrick L. Tessier, Diane P. Cogley Johnson, and John J. Cogley, Jr., all appeal the district court's denial of their requests for permission to file late proof of claims and be included among the plaintiff class in this case. We affirm the orders appealed by Mr. Day, Mr. Cogley and Mrs. Johnson. With regard to Mr. Tessier's appeal, we vacate the district court's order and remand for further proceedings.

I.

The above appeals all arise out of a mass disaster toxic tort class action involving a hazardous waste dump site located in Livingston Parish, Louisiana. The site served as a oil recycling facility until 1980. It is now the Combustion, Inc. Superfund site. The class contends that the defendants named in the action are responsible for numerous damages including

serious illnesses suffered by those exposed to the toxic chemicals and also damage to the property exposed to those chemicals.

In 1991, the Combustion site class was certified by the state district court. That same year, the same court ordered notice of the class and the right to opt out of it be disseminated by mail to the last known address of all class members and published in the local newspapers. The deadline for opting out of the class was set for May 1993. In 1993, the action was removed to federal district court.

In July 1994, the district court ordered all putative class members to file proof of claim by December 31, 1994. The forms were intended to assist the district court in claims evaluation and trial preparation. The notice advised the putative class members that failure to meet this deadline constituted waiver of any right to participate in the litigation. This notice was also disseminated by mail to last known address of all class members and published in both local papers.

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[1] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

By December 31, over 13,000 claimants had filed their proof of claim forms. In July of 1995 the district court approved a preliminary settlement agreement between the class and some of the defendants. The court ordered a September 1995 fairness hearing be held to consider the preliminary settlement. The court further ordered that all class members who had failed to timely file a proof of claim notify the court in writing of their intention to appear at the fairness hearing and show good cause for why they should be allowed to file a late proof of claim and take part in the litigation. Appellants all appeared at the hearing and were given an opportunity to justify their late filing. The district court denied all of the appellants' requests to file late claims and these appeal followed.

I.

A.

Johnson and Cogley argue that they were misled by the notice informing them of the need to file a proof of claim. They argue that they reasonably interpreted the notice as limiting eligible filers to current property owners or residents of Livingston Parish. The order is clearly not so limited and the district court correctly rejected this argument.

As to Mr. Day, [2] he argues that he did not timely file because he feared retaliation by his employer. He produced no evidence tending to substantiate his fear and the district court was entitled to reject this excuse as good cause to file a late proof of claim. We have considered the other arguments made by Mr. Day, and find them meritless.

B.

We now turn to Mr. Tessier's appeal. In response to the district court's order regarding late proof of claims requests, Mr. Tessier informed the district court by letter that he is a land owner who qualifies as a class member[3] and that he had not received any notification of the suit until contacted after the December deadline by an appraiser hired by one of the plaintiff attorneys:

> Despite the fact that for more than 20 years I have owned over 100 acres of land less than one-quarter mile downstream from the pollution source, no personal notice was sent to me regarding this lawsuit. I understand that notice was given in the newspapers, but I have not seen any notice in the Advocate. I do not read any newspapers from Livingston Parish.

Mr. Tessier also attached a map of Livingston Parish that shows the location of his property in relation to the Superfund site. The court acknowledged receipt of this letter and instructed Mr. Tessier to appear before the court on September 27, 1995.

At the hearing, Mr. Tessier stated that "his name and address are readily ascertainable and [that] due process requires personal notice when addresses are readily ascertainable through the public records." The court disagreed without discussion and issued an order dismissing the request and stating "this Court found that notice was reasonable and adequate in compliance with due process requirements..."

Federal Rule of Civil Procedure 23 (c) (2) provides "[i]n any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort..." Fed. R. Civ. P. 23 (c) (2). In Eisen v. Charlisle & Jacquelin, the Supreme Court held "the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses are ascertained through reasonable effort."

Eisen, 471 U.S. at 173; See also In re Nissan Motor Corp. Antitrust Litigation, 552 F. 2d 1088, 1097 (5th Cir. 1977) (stating that publication is not a substitute for personal notice if the individual's name and address were ascertainable through reasonable efforts).

Mr. Tessier argues that his name and address were readily discernable from the public records of Livingston Parish. If reasonable effort would have uncovered his name and address, Mr. Tessier did not receive the personal notification to which he is entitled. Moreover, if he did not receive personal notification to which he is entitled, this amounts to good cause for not filing a timely proof of claim.

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[2] Day's brief lists seven members of the Day family as appellants. However, we treat the brief submitted only on behalf of John H. Day, Jr. because only John, Jr. signed the brief. Parties appearing pro se must sign the documents they file. See Local Rule 28.6; Robinson v. National Cash Register Co., 808 F. 2d 1119, 1128 (5th Cir. 1987) (stating "a party appearing pro se must sign the document he files").

[3] Class members include "all persons or entities who or which own real estate or personal property and/or live and/or operate places of business... in Livingston Parish, Louisiana..."

Because it is not clear from the district court's order that the Eisen standard was applied or whether reasonable effort would have uncovered Mr. Tessier's name and address, we remand this case to the district court to make such a determination and for further proceedings. Specifically, the district court's inquiry should be whether reasonable effort would have included a search of any public records that contain Mr. Tessier's name and address. If so, Mr. Tessier should be permitted to file a late proof of claim and take part in the litigation.

III.

For the reasons stated above, we affirm the district court's order denying Mr. Johnson, Mrs. Cogley and Mr. Day's requests to file late claims. However we vacate the order denying Mr. Tessier's request and remand this case to the district court for further proceedings.

AFFIRMED, VACATED and REMANDED.

UNITED STATES DISTRICT COURT

WESTERN DIVISION OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

IN RE: COMBUSTION, INC.

ACTION NO. 94MDL4000

U.S. District Court
Western Division of Louisiana
Filed
Sep 27, 1997
Robert H. Shemwell, Clerk
By: ROW
Deputy

ALL CASES

JUDGE HAIK

MAGISTRATE JUDGE TYNES

JUDGMENT

This court finds that the Plaintiffs' Steering Committee, in accordance with the instructions of this Court, issued sufficient notice to the members of the plaintiff class herein of the requirement to complete a Proof of Claim in a timely manner. This court also finds that the Claimant did not comply with said requirement and has not shown good cause for such failure. In consideration hereof,

IT IS HEREBY ORDERED AND ADJUDGED that the claims of

Patrick Tessier

be and are DISMISSED WITH PREJUDICE for failure to comply with procedures established by this Court pursuant to

Fed. R. Civ. Pro 23 (d) (2) for asserting a claim for damages herein.

Lafayette, Louisiana, this 27th day of September 1995.

R. T. Haik

RICHARD T. HAIK, SR.
UNITED STATES DISTRICT JUDGE